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IN THE

Supreme Court of The United States

OCTOBER TERM, 1957

No. 991

E. E. FORBES, ET AL.,

Petitioners,

v.

CITY OF HOUSTON, ET AL.,

Respondents.

BRIEF OF RESPONDENTS, CITY OF HOUSTON AND ROY B. OAKES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The respondents, City of Houston and its Controller, Roy B. Oakes, file this opposition to the Petition for Writ of Certiorari filed by petitioners to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of the State of Texas.

QUESTIONS PRESENTED

The trial court granted respondents' Motion for Summary Judgment which was based on two grounds: (i) the undisputed evidence establishes that the City of Houston complied with the requirements of its charter in passing the Annexation Ordinance, and (ii) that even if there were procedural irregularities, such questions cannot be raised on collateral attack because the ordinance would not be void (R. p. 34). The only federal question involved here is:

Does the well-established rule that a private citizen cannot attack collaterally a city ordinance unless it is void contravene any of the constitutional guaranties of the Fourteenth Amendment?

The questions set forth by petitioners relate to constitutional questions which might arise in an attempt by petitioners to bring a *quo warranto* proceeding or to mandamus the State's Attorney to join in such suit. They could have no relevance in this suit for an injunction which is a collateral attack on the Annexation Ordinance.

STATEMENT OF THE CASE

(1) The Decisions of the Texas Courts in This Case.

Petitioners elected to bring this suit as a collateral attack upon Annexation Ordinance No. 3351, which was passed on final reading by the Houston City Council on December 31, 1956. They sought to enjoin the assessment of city taxes on their lands and to have determined under the Texas Declaratory Judgment Act that the ordinance was void (R. p. 1). The trial court sustained respondents' Motion for Summary Judgment and the Court of Civil Appeals affirmed this judgment (R. p. 218). The Texas Supreme Court refused to hear the case on the ground that there was no reversible error.[1] The Court of Civil Appeals passed on all questions raised by petitioners which would have rendered the ordinance void, but the Court held that alleged procedural irregularities in the passage of the ordinance would not render it void and could not be considered on collateral attack.

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[1] In their Application for Writ of Error to the Supreme Court of Texas, petitioners assigned eighteen points of error. By denying the application, the Texas Supreme Court approved each and all of the holdings of the Court of Civil Appeals which were assigned as error. *Firemen's and Policemen's Civil Service Commission v. Wells*, ... Tex. ....., 306 S.W. 2d 895, 897 (1957).

(2) The Facts.

The matter of annexing additional territory to the City of Houston was before the City Council for eleven months in 1956. On February 1, 1956, there was introduced before the City Council and read on first reading Ordinance No. 2234, which provided for annexing substantially the same land as ultimately included on the final passage of Ordinance No. 3351 on December 31, 1956, except the area comprising Lake Houston which was included in the later ordinance (R. p. 189). At the same meeting on February 1, 1956, Mayor Holcombe appointed an Ordinance Committee (R. p. 203), and on February 15, 1956, Annexation Ordinance No. 2234 was amended and passed on second reading (R. pp. 206-207). At a Regular Meeting of the City Council held on March 7, 1956, R. C. Platzer, one of the petitioners here, protested the proposed annexation and stated that he represented two thousand people in the Mykawa area (R. p. 208); and at Regular Meetings of the City Council held on April 18, 1956, and August 29, 1956, various matters relating to the annexation of certain fresh water supply districts were discussed by members of the public before the Council (R. pp. 209-210). While Annexation Ordinance No. 2234 was being considered by the Council, the Chairman of the Houston City Planning Commission recommended that the City Council annex Lake Houston and the canal extending from the Lake to the City limits of Houston (R. p. 208); and it was undoubtedly due to such recommendation that the City prepared a new ordinance annexing the area included in Ordinance No. 2234 and also Lake Houston. Accordingly, on October 31, 1956, Ordinance No. 3351, which is involved in this case, was introduced and read on first reading (R. pp. 80-90). On November 14, 1956, members of the public, including the petitioner,

E. E. Forbes, appeared before the City Council and protested against the annexation (R. p. 180); and on the same date the City Council adopted a motion setting a public hearing to be held in the City Council Chambers at 9:00 a.m., Monday, November 19, 1956, "for the purpose of hearing those wishing to be heard on the annexation of additional territory to the City of Houston" (R. p. 138). A public hearing was held before the City Council on November 19, 1956, for the specific purpose of hearing the public on the subject of annexation, and various members of the public appeared before the City Council and stated their position on this subject (R. pp. 138-141). Ordinance No. 3351 was read on second reading at a Regular Meeting of the City Council held on November 21, 1956 (R. pp. 92-101); and such ordinance was published in the Houston Chronicle on November 23, 1956. On November 28, 1956, other members of the public appeared at a Regular Meeting of the City Council and protested against the annexation (R. p. 181), and at the same meeting Ordinance No. 3351 was amended for the last time and then read on third reading (R. pp. 110-117). The final form of the ordinance as read on third reading was published in the Houston Chronicle on November 29, 1956 (R. pp. 61-62); and on December 5, 1956, members of the public again appeared before the City Council at a Regular Meeting and protested against the proposed annexation (R. p. 182). On December 26, 1956, the Meeting of the City Council adjourned until Monday, December 31, 1956, for the purpose of considering the final passage of the Annexation Ordinance No. 3351 (R. p. 117), and on such latter date the Council met and the ordinance was read on its fourth and final reading and adopted with only one dissenting vote. The minutes recite that "after passage of the ordinance, a gentleman came forward and

requested permission to speak before the Council, • • • Mayor Holcombe advised the gentleman that the hearing had already been held and that the public would not be heard on it again" (R. p. 64).

Petitioners filed this suit on December 28, 1956, prior to the final passage of the ordinance.

ARGUMENT

I.

THE TEXAS COURTS HAVE NOT DENIED PETITIONERS ACCESS TO THE COURTS, BUT THEY HAVE GIVEN PETITIONERS A FULL HEARING ON ALL MATTERS THAT WERE PROPERLY BEFORE THEM.

The trial court gave petitioners a hearing extending over several weeks before rendering judgment against them (R. 218). The Court of Civil Appeals discussed and passed on all questions raised by petitioners which would have rendered the ordinance void, but the Court held that the ordinance could not be attacked collaterally for alleged procedural irregularities in the passage of the ordinance as they would not render it void.

The Supreme Court of Texas has held repeatedly that procedural irregularities in the passage of a city ordinance do not render it void. *Graham* v. *City of Greenville*, 67 Tex. 62, 2 S.W. 742 (1886); *Beyer* v. *Templeton*, 147 Tex. 94, 212 S.W. 2d 134 (1948); *Kuhn* v. *City of Yoakum*, 6 S.W. 2d 91 (Tex. Comm. App. 1928); *Lefler* v. *City of Dallas*, 177 S.W. 2d 231 (Tex. Civ. App. 1943). Where the ordinance is not void, it is not subject to collateral attack. *City of Wichita Falls* v. *Bowen*, 143 Tex. 45, 182 S.W. 2d 695, 698

(1944); *Beyer* v. *Templeton*, 147 Tex. 94, 212 S.W. 2d 134 (1948); *Kuhn* v. *City of Yoakum*, 6 S.W. 2d 91 (Tex. Comm. App. 1928); *Tod* v. *City of Houston*, 276 S.W. 419 (Tex. Comm. App. 1925); *Lefler* v. *City of Dallas*, 177 S.W. 2d 231 (Tex. Civ. App. 1943; *Phillips* v. *City of Odessa*, 287 S.W. 2d 518 (Tex. Civ. App. 1956, error ref'd. n.r.e.). This holding of the courts is based on a sound public policy which demands that territorial extensions of cities should not be subject to collateral attacks as much harm would come from permitting individual citizens to attack collaterally the validity of actions of the city government from year to year. *Tod* v. *City of Houston*, 276 S.W. 419 (Tex. Comm. App. 1925); *Kuhn* v. *City of Yoakum*, 6 S.W. 2d 91 (Tex. Comm. App. 1928). These conclusions are followed uniformly by the courts of other jurisdictions.[2]

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[2] *Shapleigh* v. *San Angelo*, 167 U.S. 646, 42 L. Ed. 310, 17 S. Ct. 957 (1897); *Tulare Irrigation District* v. *Shepard*, 22 S. Ct. 531, 185 U.S. 2, 46 L. Ed. 773 (1902); *City of Blackwell* v. *City of Newkirk*, 31 Okla. 304, 121 P. 260 (1912); *Dixon* v. *City of Bremerton*, 25 Wash. 2d 508, 171 P. 2d 243 (1946); *Johnson* v. *City of Indianapolis*, 174 Ind. 691, 93 N.E. 17 (1910); *Smith* v. *City of Emporia*, 168 Kan. 187, 211 P. 2d 191 (1949); *Spiking School District* v. *Purported Enlarged School District*, 362 Mo. 848, 245 S.W. 2d 13 (1952); *Lane* v. *Finney*, 274 S.W. 2d 521 (Mo. Ct. App. 1955).

The power of the state to create, abolish, and change the boundaries of municipal corporations is not limited by requirements of "due process" and "equal protection of the law" under the Fourteenth Amendment to the Constitution of the United States. *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40 (1907); *Prosper Independent School Dist.* v. *County School Trustees*, 58 S.W. 2d 5 (Tex. Comm. App. 1933); *Schatte* v. *Schmitt*, 162 Neb. 162, 75 N.W. 2d 656 (1956); *Wheeler School District* v. *Hawley*, 18 Wash. 2d 37, 137 P. 2d 1010 (1943); *Williams* v. *Book*, 75 S.D. 173, 61 N.W. 2d 290 (1953); *Dowell* v. *Board of Education*, 185 Okla. 342, 91 P. 2d 771 (1939); *Town of Falls Church* v. *County Board*, 166 Va. 192, 184 S.E. 459 (1936); *Punke* v. *Village of Elliott*, 364 Ill. 604, 5 N.E. 2d 389 (1936); *Town of Oneida* v. *Pearson Hardwood Flooring Co.*, 169 Tenn. 449, 88 S.W. 2d 998 (1935).

Petitioners have not been denied access to the courts. The opinion of the Court of Civil Appeals discloses that the Court passed on each question raised by petitioners which might have rendered the ordinance void, but the Court held that those questions which raised procedural irregularities could not be considered on collateral attack. There is no doubt that this was a collateral attack. Petitioners sought to enjoin the assessment of taxes by the City of Houston and also requested a declaratory determination that the ordinance was void (R. p. 1). The Texas Declaratory Judgment Act [Tex. Rev. Civ. Stat., Art. 2524-1 (Vernon, 1948)] did not enlarge the jurisdiction of the courts to permit collateral attacks on ordinances which were not void. *Phillips v. City of Odessa*, 287 S.W. 2d 518, 520 (Tex. Civ. App. 1956, error ref d n.r.e.).

II.

PETITIONERS ARE SEEKING TO HAVE THE SUPREME COURT OF THE UNITED STATES PASS ON MOOT QUESTIONS.

(1) The Questions Raised by Petitioners.

Petitioners complain that under the Texas Quo Warranto Statute [Tex. Rev. Civ. Stat. Art. 6253 (Vernon, 1948)] they are denied equal protection because the State's Attorney may consent to a suit for one person and deny consent to another. They also contend that they have been denied due process because they cannot obtain the consent of the State's Attorney to a *quo warranto* proceeding.

Petitioners brought this suit as a collateral attack and after respondents raised the point that the alleged procedural irregularities in the passage of the Ordinance could not be considered in this case, petitioners sought to have the Attorney General bring a *quo warranto* proceeding.

The question whether the Attorney General will or will not institute such a suit is not material in determining the issues involved in this case. Petitioners will not have any greater rights in this particular case dependent upon the Attorney General's decision. Questions relating to the validity of the *Quo Warranto* Statute or to whether petitioners should have the right to institute such a proceeding without the consent of the Attorney General have no relevance in this case. They might be material in a suit by petitioners to mandamus the Attorney General or in an attempt by petitioners to institute a *quo warranto* suit without his consent.[3]

In the other questions raised by petitioners, they contend that they have been denied due process and equal protection because a person can bring a suit attacking an ordinance which is void on its face, but they cannot institute a case where the ordinance is not void on its face. This entire argument is wholly immaterial. The ordinance was not shown to be void on its face or by extraneous evidence and accordingly petitioners could not maintain this suit as a collateral attack. Furthermore, the Court of Civil Appeals considered all points raised by petitioners except those relating to alleged procedural irregularities. Since the Texas courts have held that such irregularities render the ordinance voidable and not void, they cannot be raised on collateral attack by petitioners or anyone else. Therefore, petitioners have not been denied equal protection.

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[3] Cf. *Newman* v. *United States*, 238 U.S. 537, 59 L. Ed. 1446, 35 S. Ct. 881 (1915); *Wright* v. *Allen*, 2 Tex. 158 (1847); *Staples* v. *State*, 112 Tex. 61, 245 S.W. 639 (1922); *People* v. *Reclamation Dist.*, 169 Cal. 786, 147 P. 1176 (1915); *Rowan* v. *City of Shawneetown*, 378 Ill. 289, 38 N.E. 2d 2 (1941); *State* v. *Brackman*, 272 S.W. 2d 289 (Mo. 1954); *Wagoner County Election Board* v. *Plunkett*, 305 P. 2d 525 (Okla. 1956); *State* v. *City of Reno*, 70 Nev. 167, 262 P. 2d 353 (1953); *State Ry. Comm.* v. *People*, 44 Colo. 245, 98 P. 7 (1908).

(2) The Finding that Respondent, City of Houston, Complied with all Mandatory Requirements of Its Charter in the Passage of the Annexation Ordinance Renders Immaterial the Purported Federal Questions Raised by Petitioners.

Respondents' Motion for Summary Judgment was based on two grounds and either ground is sufficient to support the judgment of the trial court. One of these grounds is that the City of Houston complied with the requirements of its City Charter in the passage of the Annexation Ordinance. The undisputed evidence in the record supports this conclusion. Since the Court did not state in his judgment the basis for his decision and as petitioners did not request findings of fact and conclusions of law, it must be presumed that the trial court found all facts to support his judgment. Tex. R. Civ. P. 296-299; *Construction and General Labor Union* v. *Stephenson*, 148 Tex. 434, 225 S.W. 2d 958 (1950); *Old Nat. Life Ins. Co.* v. *Guest*, 163 S.W. 2d 241 (Tex. Civ. App., 1942, error ref'd. w.o.m.).

Therefore, even if the Supreme Court should take jurisdiction of this case, it would be compelled to affirm the judgments of the Texas Courts because it must be presumed that the evidence establishes that the City of Houston complied with all procedural requirements in the passage of the Annexation Ordinance and accordingly that the ordinance is valid. Thus, the attempt by petitioners to have the Supreme Court pass on alleged federal questions which might be pertinent in some other case and which under no circumstances could require a reversal of this case, is an effort on the part of petitioners to have this Court determine moot questions. The Supreme Court has held that it will not decide such questions. *St. Pierre* v. *United States*, 319 U.S. 41, 87 L. Ed. 1199, 63 S. Ct. 910 (1943); *Amalga-*

mated Asso. v. *Wisconsin Emp. Rel. Bd.*, 340 U.S. 416, 95 L. Ed. 389, 71 S. Ct. 373 (1951).

WHEREFORE, respondents respectfully submit that petitioners' Petition for Writ of Certiorari should be in all things denied.

Respectfully submitted,

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